The Convention for the Protection of the Marine Environment of the North-East Atlantic – New Approaches to an Old Problem?

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I. Introduction

The protection of the marine environment has been regarded as a problem within the international community ever since the negative effects of modern industrial society on the environment became apparent.

On a regional level, the elaboration of rules protecting the marine environment started in the 1970s, for obvious reasons in those regions which are surrounded by heavily-industrialised and densely-populated areas. In the North-East Atlantic this led to the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo 1972[1], and the Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris 1974[2]. During recent years awareness has increased about the wide variety of pollutants that reach the marine environment and, among others, of the necessity to establish a precautionary approach, which was not inherent in either of the Conventions[3]. The decision to

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[1] Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, 15 February 1972, 11 I.L.M. 262 (1972), as amended by the Protocols of 2 March 1983; BGBl. 1986 II, 999; and 5 December 1989, BGBl. 1994 II, 1356.

[2] Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris, 4 June 1974, 13 I.L.M. 352 (1974), as amended by a Protocol of 26 March 1986, 27 I.L.M. 625 (1988), (1974 Paris Convention), both Conventions are reprinted in: David Freestone/Ton IJlstra (eds.), The North Sea: Basic Legal Documents on Regional Environmental Co-operation, 1991.

[3] The fact that some of these actual technical standards and recent political developments were part of the decisions and recommendations of the Commissions showed that in

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revise these Conventions was taken in 1990. As they apply to the same geographical area (North-East Atlantic, Arctic Ocean, and the North Sea) but cover different subjects[4], the Contracting Parties decided to elaborate one single Convention instead of amending the existing ones.

The new Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted September 22, 1992 in Paris[5] (1992 Convention), is thus the result of an approach which seeks to unify standards in environmental law for the area of the North-East Atlantic.

A. Impact of the International North Sea Conferences

One of the main influences that had to be taken into account whilst elaborating the 1992 Convention was the progress made for the area of the North Sea by the International North Sea Conferences[6]. These legally non-binding ministerial decisions gave political impetus to the work carried out by the Commissions of the 1974 Paris and the Oslo Conventions. The North Sea, being a clearly identifiable region within the wider area of the Conventions, bounded by eight highly-industrialised riparian states, is obviously likely to be affected earlier and to a greater extent by pollution than the North-East Atlantic as a whole. Therefore, the politi-

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addition to the Conventions being outdated the actual work of the Commissions did not relate any more to the Conventions themselves.

[4] The Oslo Convention applies to the dumping of wastes at sea by ships and aircraft (Art. 19 of the Oslo Convention) and the incineration of wastes at sea (Amendment of 1983), the 1974 Paris Convention to pollution entering the marine environment through watercourses, from the coast, from man-made structures placed under the jurisdiction of a Contracting Party (Art. 3 of the Paris Convention 1974) and from atmospheric sources (Amendment of 1986).

[5] 32 I.L.M. 1069 (1993), Analyses of the 1992 Convention are to be found: Ellen Hey/Ton IJlstra/André Nollkaemper, The 1992 Paris Convention of the Marine Environment of the North-East Atlantic: A Critical Analysis, The International Journal of Marine and Coastal Law, Vol. 8 No. 1 (1993), 1–49; José Juste, La Convention pour la protection du milieu marin de l'Atlantique Nord-Est, Revue Générale de Droit International Public 97 (1993), 365–393.

[6] These Conferences are meetings of ministers – not within the framework of an international treaty or convention – with common responsibilities, their decisions are clearly of a political nature. As to the role of the International North Sea Conferences, see David Freestone/Ton IJlstra (eds.), The North Sea: Perspectives on Regional Environmental Co-operation, Special Issue of the International Journal of Estaurine and Coastal Law, 1990; Report to the Nordic Council's International Conference on the Pollution of the Seas, 16–18 October 1989, Northern Europe's seas/Northern Europe's environment, 1989.

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cians were highly aware of the magnitude of pollution of the marine environment and the scope of the problem in this "sub-region"[7].

The London North Sea Conference of 1987, for example, was the first to stress the importance of a more precautionary approach by endorsing the principle of precautionary action[8] and defined the best available technology; both concepts were in consequence adopted by the 1974 Paris Commission[9].

The International North Sea Conferences thus strongly influenced the work of the Commissions by establishing comparably high standards for the protection of the marine environment; but only the adoption of these political decisions by the Commissions could transfer them into legal obligations incumbent on Contracting Parties under international law.

B. The 1992 Convention

The new Convention codified most of the progress made in the forum of the International North Sea Conferences and incorporated mainly the recommendations and decisions taken by the 1974 Paris and Oslo Commissions. Unifying all regulations concerning the protection of the marine environment in one single international treaty offers the advantage of avoiding duplication and providing the same standards for all kinds of marine pollution.

Apart from widening its scope of application from mere pollution to adverse effects of human activities which may harm the marine environment[10], the precautionary principle[11] the polluter-pays principle[12] and the concepts of best available techniques and of best environmental practice, including clean technology[13] were formally adopted. The Commis-

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[7] As to new developments in general, compare Ulrich Beyerlin, New Developments in the Protection of the Marine Environment, in this issue.

[8] This conference is even characterized as a turning point in the protection of the North Sea Environment, Jørgen Wettestad, Science, politics and institutional design – The case of the North-East Atlantic pollution regime, Marine Policy 18 (1994), 219–232, 222.

[9] Recommendation 89/1 on the Principle of Precautionary Action and Recommendation 89/2 on the Use of Best Available Technology of the 1974 Paris Commission, both referring to the Ministerial Declaration of the 1987 London North Sea Conference (para. XVI,1 and para. X thereof); reprinted in: Freestone/IJlstra (note 2).

[10] Art. 2 para. 1 of the 1992 Convention.

[11] Art. 2 para. 2a) of the 1992 Convention.

[12] Art. 2 para. 2b) of the 1992 Convention

[13] Art. 2 para. 3 of the 1992 Convention.

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sion may now take legally binding decisions[14] and a very elaborated new compliance procedure[15] was introduced in order to ensure the effectiveness of the measures taken by the Commission.

The 1992 Convention will enter into force on the thirtieth day after ratification by all Contracting Parties to the Oslo and 1974 Paris Commissions[16]; no reservations are permitted[17]. As the entry into force will therefore foreseeably take a long time[18] the transitory provisions gain in importance. Only in Art. 31 para. 2[19] does the 1992 Convention provide a provision dealing with the continuing in force of the decisions and recommendations adopted within the scope of the Oslo and 1974 Paris Conventions. No provision is to be found relating to the work of the Commissions during the transitory period. As the work on the implementation of the Oslo and the 1974 Paris Convention was started prior to their entry into force, it might have been desirable that the Final Declaration of the Ministerial Meeting[20] had included a provision urging the Commissions to work in the spirit of the 1992 Convention.

II. The Framework

The 1992 Convention is a framework convention consisting of 34 articles which is completed by four annexes[21] – concerning respectively pollution from land-based sources, pollution from dumping and incineration, pollution from offshore activities and evaluation of the quality of the marine environment – and two appendices.

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[14] Art. 13 para. 2 of the 1992 Convention.

[15] Art. 23 of the 1992 Convention.

[16] Art. 29 of the 1992 Convention.

[17] Art. 28 of the 1992 Convention.

[18] Other instruments for the protection of the marine environment in the North-East Atlantic have entered into force up to 6 years after their adoption, compare Hey/IJlstra/Nollkaemper (note 5), 6.

[19] Art. 31 para. 2 of the 1992 Convention reads as follows: "... decisions, recommendations and all other agreements adopted under the Oslo Convention and the Paris Convention shall continue to be applicable, unaltered in their legal nature, to the extent that they are compatible with, or not explicitly terminated by, the Convention, any decisions or, in the case of existing recommendations, any recommendations adopted thereunder".

[20] Final Declaration of the Ministerial Meeting of the Oslo and Paris Commissions, 21–22 September 1992, reprinted as Appendix 2 to Hey/IJlstra/Nollkaemper (note 5), 72–76.

[21] According to Art. 14 of the 1992 Convention the "Annexes and Appendices form an integral part of the Convention".

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This step-by-step approach to regime building[22], which was first pursued by the ECE Convention on Long-range Transboundary Air Pollution, 13 November 1979[23] and the Convention for the Protection of the Ozone Layer, 22 March 1985[24], has gained importance in international environmental law. In 1992 seven Conventions[25] were elaborated, each structured alike and consisting of a framework together with various Annexes. A new trend in international environmental law to be noted in this respect is, that not only the general provisions are formally separate from the more technical Annexes, but also that a more simple procedure of amending and adopting the Protocols and Annexes is provided[26].

This development towards majority decisions illustrates that the Contracting Parties have started to recognise the outstanding significance of the protection of the marine environment, even if this may result in a potential neglect of their own economic interests.

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[22] Winfried Lang, Diplomacy and International Environmental Law Making: Some Observations, Yearbook of International Environmental Law 3 (1992), 108–122, 119 et seq.; Ulrich Beyerlin, Rio-Konferenz 1992: Beginn einer neuen globalen Umweltrechtsordnung?, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 54 (1994), 124–149, 141 et seq.

[23] 18 I.L.M. 1442 (1979); Protocols of 28 September 1984, 27 I.L.M. 701 (1988); 8 July 1985, 27 I.L.M. 707 (1988); 31 October 1988, 28 I.L.M. 214 (1989); 18 November 1991, 31 I.L.M. 573 (1992), and of 14 June 1994 (not yet published).

[24] 26 I.L.M. 1516 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 I.L.M. 1541 (1987), as amended 30 I.L.M. 537 (1990) and 32 I.L.M. 874 (1993).

[25] Apart from the 1992 Convention, the Convention on Biological Diversity of 5 June 1992, 31 I.L.M. 849 (1992); the Framework Convention on Climate Change of 9 May 1992, 31 I.L.M. 818 (1992); the Convention on the Protection of the Marine Environment of the Baltic Sea Area, BGBl. 1994 II, 139; the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, Doc. E/ECE/1267; and the ECE Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992, Doc. E/ECE/1268 (both ECE Conventions are reprinted in: Yearbook of International Environmental Law 3 (1992), 703 et seq.) are structured alike, consisting each of a framework and various Annexes; the Convention on the Protection of the Black Sea against Pollution of 21 April 1992, 32 I.L.M. 1101 (1993) is supplemented by different protocols.

[26] Art. 9 para. 4 for the Convention for the Protection of the Ozone Layer (note 24) provides for a two-thirds majority for amending protocols, whereas amendments to the Convention shall according to Art. 9 para. 3 at least be adopted by a three-fourth majority. As to the EEC Convention on the Transboundary Effects of Industrial Accidents (note 25), Annex I may according to Art. 26 para. 4 be amended by a nine-tenth majority. Concerning the 1992 Convention unanimity is required for amendments of the Conventions (Art. 15), whereas Annexes may be amended and adopted by three-quarters majority (Art. 17). However, all Conventions provide, that only those Parties who accept the amendments adopted by majority decision are bound to it.

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A. General Principles

1. The definition of pollution

Unlike the Oslo and the 1974 Paris Convention, the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic mentions explicitly all sources of pollution of the marine environment[27]. Art. 1 contains 18 definitions, the most relevant one for the substantive scope of the Convention being that of "pollution".

According to Art. 1 d) "'Pollution' means the introduction by man, directly or indirectly, of substances or energy into the maritime area which results, or is likely to result, in hazards to human health, harm to living resources and marine ecosystems, damage to amenities or interference with other legitimate uses of the sea". Unlike the definition of pollution in Art. 1 para. 1 of the 1974 Paris Convention and Art. 1 para. 4 of the UN Convention of the Law of the Sea[28], the Contracting Parties incorporated a precautionary element by adding the words "is likely to result"[29]. However, the Oslo Convention already contains this element in its Art. 1 by preventing "pollution of the sea by substances that are liable to create hazards ...", without referring explicitly to a principle of precautionary action.

The definition of pollution being thus progressive, it still maintains the term "introduction of substances or energy", which is considered as a limiting factor and has been dropped in recently established treaties[30].

2. The precautionary approach

The precautionary principle was introduced into international policy by the 1987 London International North Sea Conference[31]. It was later transferred into a Recommendation of the 1974 Paris Commission[32], but

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[27] Compare the last preambular paragraph: "... which addresses all sources of pollution of the marine environment ...".

[28] UN Convention of the Law of the Sea; A/CONF.62/122, the definition is in substance the same, compare Juste (note 5), 372.

[29] As to the impact on the precautionary principle, compare below.

[30] Compare Art. 21 para. 2 of the Draft Articles of the International Law Commission on the Law of the Non-Navigational Uses of International Watercourses; Report of the International Law Commission, 42 Session, GA Doc. A/45/10 (suppl. no. 10), 158–160; Hey/IJlstra/Nollkaemper (note 5), 8.

[31] Para. XVI, 1 of the Declaration of the 1987 London International North Sea Conference (note 9).

[32] PARCOM Recommendation 89/1 of 22 June 1989 (note 9).

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the 1992 Convention is the first international treaty which explicitly adopts this principle. Therefore, the mandatory prescription is in itself an important achievement. However, precautionary elements were already incumbent in other Conventions in international environmental law, for example in the Convention for the Protection of the Ozone Layer[33].

The above-mentioned principle[34] is of basic importance for the protection of the marine environment. It stipulates that preventive measures have to be taken in cases of doubt whether a substance is harmful or not. Criteria to be referred to are the foreseeability or likelihood of harm and the potential gravity of harm that may be caused by a substance[35]. But protective action does not have to await conclusive scientific evidence of the harmfulness; on the contrary, the burden of proof is shifted from the parties advocating protective measures to those that argue that preventive or remedial action is not necessary. As a consequence measures have to be implemented as soon as harmful effects of a certain substance seem plausible[36].

Best available techniques (BAT) and best environmental practice (BEP)[37] should be taken into account in order to render the measures as effective as possible. It is of basic concern by what mechanism international law can ensure that measures be implemented in a like manner[38]. According to Art. 2 para. 2a) of the 1992 Convention the Contracting Parties shall apply "the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when

[33] The preamble refers to the "potentially harmful impact ...", according to Art. 2 para. 1 the environment should be protected against adverse effects that "... are likely to result from human activities ...".

[34] Compare Lothar Gündling, The Status in International Law of the Principle of Precautionary Action, in: Freestone/IJlstra (note 2), 23–30; Ellen Hey, The Precautionary Approach – Implications of the Revision of the Oslo and 1974 Paris Conventions, Marine Policy 15 (1991), 244–254; idem., The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution, Georgetown International Environmental Law Review 4 (1992), 303–318; Alan E. Boyle, Land-based sources of marine pollution – Current legal regime, Marine Policy 16 (1992), 20–35.

[35] Boyle (note 34), 23, by referring to the *Trail Smelter* Case as well as the *Corfu Channel* Case of the ICJ.

[36] Hey, Precautionary Approach (note 34), 245.

[37] For the concepts of BAT and BEP, see below.

[38] Compare below.

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there is no conclusive evidence of a causal relationship between the inputs and the effects" (emphasis added). The precautionary principle is part of the general obligations of Art. 2. The first paragraph of this article states the general obligation of the Contracting Parties to "... take all possible steps to prevent and eliminate pollution and ... (to) take the necessary measures to protect the maritime area against the adverse effects of human activities ..." (emphasis added), thus not limiting its scope of application to threats caused by pollution as defined in Art. 1d) of the 1992 Convention[39]. The precautionary principle might thus be applicable not only to prevent pollution but also to protect the marine environment against the adverse effects of human activities. But as the definition of this principle in Art. 2 para. 2a) almost literally cites the definition of pollution in Art. 1d) of the 1992 Convention[40], it is obvious that a precautionary approach is only provided for in cases of pollution of the marine environment. Reasons for the Contracting Parties to mention adverse effects of human activities only in the very general provision of Art. 2 para. 1a) are not obvious. They might have considered these aspects already appropriately regulated under other international global and regional agreements dealing with these questions. This is at least explicitly stated as far as fishing activities are concerned[41].

Although the precautionary principle is not restricted to any special substances, as was the case with the Recommendation of the 1974 Paris Commission as well as with the Declaration of the London International North Sea Conference, it is therefore still limited to activities which may cause pollution as defined in the 1992 Convention and is not extended to all activities that may cause adverse effects on marine environment.

Apart from that restriction, the importance of the introduction of the precautionary approach might be even more limited by the fact that the definition of pollution itself already contains a precautionary element. But the precautionary principle as defined in Art. 2 para. 2a) adds to the element incumbent in the definition of pollution[42] the requirement to take preventive measures even if there is no conclusive evi-

39 Hey/IJlstra/Nollkaemper (note 5), 8, who state, that the negotiating parties thus compensate the deficiencies of the definition of pollution.

40 Differentiating from it only by the missing words "by man", what cannot be considered as decisive as Art. 2 para. 1 refers to "adverse effects of human activities ...".

41 Twelfth preambular paragraph of the 1992 Convention.

42 Art. 2 para. 1a): "... when there are reasonable grounds for concern ... may ..." differentiates only slightly from Art. 1d): "... which results, or is likely to result ...", meaning essentially the same.

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dence. This shifting away from the primacy of scientific proof and rejecting of the assimilative capacity approach[43] is decisive for the effective application of the precautionary principle in practice.

3. *The polluter-pays principle*

Art. 2 para. 2b) of the 1992 Convention states that the Contracting Parties shall apply the "polluter-pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter". No further qualification of or restriction to this principle can be found in the Convention. Although included in several international treaties[44] since 1987, this principle is not part of the Oslo or 1974 Paris Conventions. The unconditional prescription of this principle creates problems relating to its practical application. According to Art. 10 of the 1992 Convention the Commission may draw up "programmes and measures (which) may ... include economic instruments"[45], so that the content of the polluter-pays principle within the scope of the 1992 Convention may thus be clarified, but it cannot be assumed that the Contracting Parties intended the Commission to define the scope of this principle.

The problem might be less relevant if the principle was clearly defined in international environmental law, thereby providing a guideline for its interpretation. The principle was first referred to only as an economic principle for environmental policies. Initially limited to the costs of prevention and control measures to be taken by the polluter, it was recently extended also to administrative costs, damage and compensation[46]. In addition to that it also expresses a fundamental moral judgement about the allocation of responsibility for environmental protection in complex

[43] According to which science has accurately to determine the assimilative capacity of the environment and that then preventive action should be taken; compare Hey, Institutionalizing Caution (note 34), 305 et seq.

[44] See Art. 130r para. 2 of the EEC Treaty, introduced by Art. 25 of the Single European Act; O.J. L 169/1, 29, Art. 3 para. 4 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (note 25); for a global level Principle 16 of the Rio Declaration on Environment and Development, 31 I.L.M. 876 (1992).

[45] As to the variety of economic instruments, compare Adrian Hughes, Economic Measures to protect the environment, Marine Policy 16 (1992), 36–42.

[46] Henri Smets, Le principe pollueur payeur, un principe economique érigé en principe de droit de l'environnement, Revue Générale de Droit International Public 97 (1993), 339–364, 346 et seq.

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societies[47]. The polluter-pays principle therefore not only embodies different concepts but is also a principle still under development, thus not clearly defined in international law[48]. Therefore, the general obligation in Art. 2 para. 2b) of the 1992 Convention can only be regarded as a very general and unqualified guideline to which various exceptions might be legitimate.

4. Best available techniques and best environmental practice

Art. 2 para. 3b) of the 1992 Convention states that in adopting programmes and measures the Contracting Parties shall, "... define ... the application of, *inter alia*, best available techniques, (and) best environmental practice, including, where appropriate, clean technology; (and) in carrying out such programmes and measures, ensure the application of ..." these concepts. Again, the International North Sea Conferences[49] referred first to the application of BAT and BEP, a development which was later incorporated in the scope of the 1974 Paris Convention by recommendations of the Commission[50]. In the 1992 Convention, the use of BAT and BEP as well as clean technology is taken up in Annex I and Annex II. Criteria for the definition of these techniques and practice are set out in Appendix 1; concerning the development of cleaner technologies, no definition is contained within the scope of the 1992 Convention; but as BAT and cleaner technologies are apparently supposed to be different concepts, a definition of the latter might have been desirable.

According to Art. 2 para. 3b) of the 1992 Convention these criteria have only to be taken into account when defining BAT and BEP. Obviously there is a wide discretion of the Contracting Parties in actually determining what constitutes these concepts[51]. An objective determination of BAT is even more difficult due to the fact that the criteria set out in Art. 2 of Appendix 1 are not prioritised[52]. According to Art. 6 of Appendix 1, relating to the use of BEP, the most appropriate combination of environmental control measures and strategies have to be attemp-

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47 Sanford E. Gaines, The Polluter-Pays-principle: From Economic Equity to Environmental Ethos, Texas International Law Journal 26 (1991), 463–496, 496.

48 Boyle (note 34), 33 et seq.; Gaines (note 47), 463–496.

49 Para. X of the 1987 London Conference (note 9).

50 Recommendation 89/2 of 22 June 1989 (BAT) and 91/1 of 20 June 1991 (BEP), reprinted in Freestone/IJlstra (note 2).

51 Hey/IJlstra/Nollkaemper (note 5), 15.

52 Which may, as Hey/IJlstra/Nollkaemper (note 5), 16, show, lead to contradictory outcomes.

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ted. A graduated range of measures is outlined in Art. 6 a–i), but as for the use of BAT, particular consideration is to be given to several criteria which are not prioritised. Art. 4 and Art. 9 of Appendix 1 show that the application of BAT and BEP may lead to environmentally unacceptable results and provide that additional measures should be then applied. This might refer to the development of clean technologies as mentioned in Art. 2 para. 3b i) of the 1992 Convention but the Appendix does not explicitly refer to this article. As the Contracting Parties thus have a wide discretion in defining BAT and BEP, the obligation to ensure the application of BAT and BEP in carrying out the measures and programmes implementing the 1992 Convention[53] might not considerably restrict them.

B. Institutional approach/Compliance procedure

Even if the content of the principles analysed above remains somewhat unclear in the 1992 Convention, the incorporation of these principles itself is already an important improvement. Nevertheless this will remain without any substantial effect if the Convention does not provide means to implement these principles in practice.

1. The Commission

As has proved successful within the scope of the Oslo and the 1974 Paris Conventions, the implementation of the 1992 Convention is supervised by a Commission which is established by Art. 10. Just like its predecessors, this new Commission is also made up of representatives of all Contracting Parties. In contrast to the previous Commissions – but not to the practice[54] – Art. 11 of the 1992 Convention now explicitly admits observers to participate in meetings of the Commission (without the right to vote) and to present reports or relevant information.

The duties of the Commission are, apart from the general supervision of the implementation of the 1992 Convention, to review the conditions of the maritime area and the effectiveness of the adopted measures, to draw up programmes and measures for the prevention and elimination of

[53] Art. 2 para. 3b) ii) of the 1992 Convention.

[54] In 1990 several non-governmental organizations (Greenpeace, Friends of the Earth, World Wide Fund for Nature) were admitted to the meetings of the Oslo and the 1974 Paris Commissions, Hey/IJlstra/Nollkaemper (note 5), 38 et seq.

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pollution and control these activities, to set up subsidiary bodies and to define their terms of reference[55].

By replacing the Oslo and the 1974 Paris Commissions by one single Commission the difficult co-ordination between the two has been suspended and duplicate work is excluded *per se*[56]. Thus the new Commission is likely to work more transparently and efficiently. It may adopt non-binding recommendations and binding decisions[57], both of which should be generally adopted by unanimity. If unanimity is not attainable, a three-quarters majority vote will suffice, but only those Contracting Parties which accept a decision adopted in this way are bound by it (opting-out procedure).

2. *Compliance procedure*

The efficiency of international standards depends largely upon effective means of compliance and enforcement. Therefore the compliance procedure provided for in the 1992 Convention is of considerable importance.

The Commission shall, according to Art. 23 of the 1992 Convention:

> "a) on the basis of the periodical reports referred to in Art. 22 and any other report submitted by the Contracting Parties, assess their compliance with the 1992 Convention and the decisions and recommendations adopted thereunder;
>
> b) when appropriate, decide upon and call for steps to bring about full compliance with the Convention, and decisions adopted thereunder, and promote the implementation of recommendations, including measures to assist a Contracting Party to carry out its obligations"(emphasis added).

The first paragraph refers not only to the duty to report of the Contracting Parties[58] – which provides the input for the assessment of compliance – but also contains the corresponding right of the Commission to review these reports. This resembles the reporting system established under the human rights treaty bodies[59].

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55 Compare Art. 10 para. 2 of the 1992 Convention.

56 The 1974 Paris and the Oslo Commissions operated by working groups in order to ensure the day-to-day work, the two Commissions being co-ordinated by a joint secretariat. In the past the 1974 Paris Commission was loaded with considerably more work than the Oslo Commission.

57 Art. 10 para. 3 and Art. 13 of the 1992 Convention.

58 The reporting system is laid down in Art. 22 of the Convention.

59 Compare, for example, Art. 9 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, UNTS 660, Nr. 9464. Nevertheless such a

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But Art. 23 of the 1992 Convention goes even beyond this by providing in its second paragraph the competence of the Commission to take measures to ensure compliance, which is as present only to be found within the regime of the ozone-layer[60]. Compared to other international treaties protecting the marine environment, the reporting system provided for in Art. 22 of the 1992 Convention is comparatively elaborated[61].

According to it Contracting Parties shall report at regular intervals[62] on measures taken by them for the implementation of the provisions of the Convention (including decisions and recommendations), and particular measures taken to prevent and punish conduct in contravention of these provisions. Neither the Oslo nor the 1974 Paris Conventions provided for a procedure to report on the implementation of decisions and recommendations. However in 1987 the 1974 Paris Commission reached agreement to the effect that decisions and recommendations should include provisions for reporting. Nevertheless, only some recommendations and decisions in fact corresponded.

Art. 22 comprises also the duty to report on the effectiveness of the measures taken and on problems that occurred in the implementation[63], which was not contained in either of the preceding Conventions. This might result in earlier recognition of problems that particular states encounter, thus making it possible to assist them according to Art. 23b) and to judge the need for additional or different measures already at an early stage according to Art. 10 para. 2b). The established reporting system is thus quite extensive, and constitutes a broad basis for measures of compliance.

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reporting system is first mentioned in Art. 22 of the ILO Constitution established 1919, UNTS 15, 35.

[60] In Art. 8 of the Montreal Protocol on Substances that Deplete the Ozone Layer (note 24). According to the non-compliance procedure of the ozone-layer regime compare: Winfried Lang/Willy Kempel, The Year in Review, Air and Atmosphere/Ozone Layer, in: Yearbook of International Environmental Law 1 (1990), 95–99; Martti Koskenniemi, Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, Yearbook of International Environmental Law 3 (1992), 123–162.

[61] Convention on the Protection of the Marine Environment of the Baltic Sea Area (note 25), Art. 16 provides for the same reporting system, but there is no compliance procedure to be found. Reporting systems are also provided for in Art. 26 of the Convention on Biological Diversity (note 25) and Art. 12 of the Framework Convention on Climate Change (note 25); whereas Art. 23 para. 4a) of the Convention on Biological Diversity also confers upon the Commission to consider the reports; a non-compliance procedure is not comprised.

[62] Which period is not specified.

[63] Art. 22 b–c) of the 1992 Convention.

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Whether the Commission may base its decisions also on reports of observers remains doubtful. Art. 22 as well as Art. 23 refer only to reports of the Contracting Parties, which might not have intended the observers to play a decisive role in such a sensitive matter as ensuring compliance.

Even if according to the second paragraph of Art. 23 the competence to take measures to ensure compliance is conferred upon the Commission, which was not within the mandate of the Oslo and the 1974 Paris Commissions, it is not specified in the 1992 Convention what kind of steps might be taken to ensure compliance. They will certainly include assistance to a Contracting Party, as is explicitly stated, and possibly political pressure. It is doubtful whether sanctions would be included hereby. In line with recent developments, economic incentives to promote environmental objectives may be a possible means to promote compliance. The fact that the reporting system as well as the compliance procedure refer not only to the 1992 Convention itself and legally binding decisions but also to non-binding recommendations, may amount to a comparatively small practical difference between these two instruments[64]. But whereas the Commission has to bring about full compliance with decisions, it is only obliged to promote the implementation of recommendations.

As the Montreal Protocol on Substances that Deplete the Ozone Layer and the 1992 Convention are at present the only instruments in international environmental law which provide such an elaborate noncompliance procedure, a comparison of the two might illustrate to what extent a uniform system is developed. First of all, according to Annex III Art. 1 of the Montreal Protocol, Parties which have reservations regarding another Party's implementation may address in writing to the Secretariat, whereas according to Art. 23 the Commission bases its decisions on reports of the Contracting Parties about measures taken by them to implement the provisions of the 1992 Convention. The regime of the ozone layer seems in this respect to put more pressure on the parties to comply. But as states are in general very restrained in their comments about other states and as the Contracting Parties may be more aware of their own problems than of those of others, this difference is not decisive. The reporting system of Art. 23 of the 1992 Convention might be even more effective. The main difference concerns the

[64] There is no reference to recommendations in the settlement of disputes procedure of Art. 32 of the 1992 Convention.

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procedure itself. In the regime of the ozone layer the Parties address their reservations to the Secretariat which then transmits this information to a Special Committee. After consideration the Committee reports to the Meeting of the Parties which then "decides upon and calls for steps to bring about full compliance with the Protocol, including measures to assist the Party's compliance with the Protocol, and to further the Protocol's objectives". According to Art. 23 of the 1992 Convention the Commission is the only competent organ to receive and consider the reports of the Parties and to "decide upon and call for steps to bring about full compliance". Thus, although there are only small differences concerning the reporting system and although the measures that the competent organ may adopt in order to bring about full compliance are almost literally the same, the non-compliance procedure of the regime of the ozone layer is more time-consuming and might therefore turn out to be less effective than the one of the 1992 Convention. But even an elaborate non-compliance procedure depends largely on the willingness of the Contracting Parties to invoke it.

3. Settlement of disputes

Art. 32 deals with the settlement of disputes. According to its para. 1 disputes of the Contracting Parties shall only be submitted to arbitration according to the procedure of Art. 32 if they "cannot be settled otherwise ... for instance by means of inquiry or conciliation within the Commission". The arbitral tribunal therefore acts only subsidiary to the Commission. In addition, the mandate of the established tribunal does not include the possibility to deal with non-binding rules, whereas the Commission may also deal with recommendations[65], showing that the Contracting Parties intended to strengthen the role of the Commission as far as the prevention and resolution of conflicts is concerned.

However, the procedure for the settlement of disputes may gain considerably in importance as regards measures of non-compliance. If, according to a Contracting Party, the Commission does not adequately react to the non-compliance of another Party[66], the respective Party might be brought to arbitration under Art. 32. Arbitration thus might be used to compel Parties to comply with the 1992 Convention, but it re-

[65] The compliance procedure applies also to non-binding recommendations, Art. 23 of the 1992 Convention.

[66] Which may be possible, as the Commission may take steps to ensure compliance, "where appropriate according to art. 23", and therefore has a wide discretion.

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mains doubtful whether Parties will in fact have recourse to this possibility.

4. Regionalisation

Art. 24 provides for the possibility of different timetables as well as decisions or recommendations concerning only a specified (geographical) part of the maritime area. By that the 1992 Convention pays attention to the difference between ecological and economic conditions in the various regions and sub-regions of the North-East Atlantic. Art. 24 has to be seen in context with Art. 21 concerning transboundary pollution. This provides for the Contracting Parties to negotiate co-operation agreements on a sub-regional level by defining "quality objectives to be achieved and the methods for achieving these objectives". Art. 24 enlarges subregional co-operation from mere matters of transboundary pollution to differences between ecological and economic conditions in general. But as Art. 24 concerns decisions and recommendations of the Commission, Art. 21 and the corresponding general provision in Art. 2 para. 5[67] refer to the co-operation between the Contracting Parties which may lead to more stringent measures applicable to a specific area. The result thus being the same, the Convention provides for the Commission as well as the Contracting Parties to adopt measures of regionalisation. One problem under the regime of the Oslo and 1974 Paris Conventions was to incorporate the more ambitious targets achieved at the International North Sea Conferences. Stricter rules at least for a sub-region were desirable, but as the Conventions did not provide for different standards of environmental protection in different sub-regions the acceptance of these ambitious rules on the regional level was not likely. This problem was resolved in 1988 by a procedural arrangement adopted by the Oslo and 1974 Paris Commissions, which allowed not only for different timetables but also for different means to be applied in different sub-regions under the restriction that the goal to be attained is the same[68]. Art. 24 now seems to adopt this approach, unfortunately without a corresponding restriction. Differ-

[67] Which reads as follows: "No provision ... shall be interpreted as preventing the Contracting Parties from taking, individually ore jointly, more stringent measures ...".

[68] 13th Annual Report of the Oslo Commission (1988) 5, para. 27; 10th Annual Report of the 1974 Paris Commission (1988) 4, para. 17. For example, according to the OSCOM Dec. 90/2, of 23 June 1990, in: Freestone/IJlstra (note 2), the decision to reduce incineration at sea by not less than 65 % by 1 January 1991 applies only to the North Sea States, Hey/IJlstra/Nollkaemper (note 5), 41.

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ent timetables and applicable decisions/recommendations in sub-regions offer the advantage of elaborating stricter rules for areas where the political willingness is found. But there is a risk, especially as the attained goal does not have to be the same, that different standards of protection apply within the scope of the 1992 Convention.

III. The Annexes

Of the four annexes, two correspond to sources of pollution already referred to by the former Oslo and 1974 Paris Conventions[69]. By applying to the prevention and elimination of pollution from offshore sources the 1992 Convention adds a new source of pollution; the last Annex adds the aspect of assessment of the quality of the marine environment.

A. Land-based pollution

Land-based sources contribute around 70 per cent[70] to marine pollution. The provisions on land-based pollution constitute therefore, at least from the viewpoint of their potential contribution to the protection of the marine environment, the most important part of the 1992 Convention. In order to include the practice of disposing of radioactive waste in repositories constructed in bedrock under the sea-bed within the material scope of application of the 1992 Convention the definition of land-based sources in Art. 2e) now adds a corresponding new element to the definition of the 1974 Paris Convention[71]. The obligation of the parties is – like for all other sources of pollution – contained in an Article of the general provisions and then specified in an Annex to the 1992 Convention. The general provision obliges the Contracting Parties to "take, individually and jointly, all possible steps to prevent and eliminate pollution ..." from the respective sources. Even if this wording may recall the text of the

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[69] Annex I concerning the prevention of pollution from land-based sources and Annex II on the prevention and elimination of pollution by dumping or incineration.

[70] Agenda 21, 17.18; A/CONF.151/26/Rev.1, Vol. 1, 243.

[71] Art. 1e) of the 1992 Convention reads as follows: "Land-based sources means point and diffuse sources on land from which substances or energy reach the maritime area by water, through the air, or directly from the coast. It includes sources associated with any deliberate disposal under the sea-bed made accessible from land by tunnel, pipeline or other means and sources associated with man-made structures placed, in the maritime area under the jurisdiction of a Contracting Party, other than for the purpose of offshore activities" (emphasis added).

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1974 Paris Convention, the approach is here methodologically different from the instruments adopted in the 1970s. Whereas the characteristic of the Oslo and the 1974 Paris Convention was to list harmful substances in black and grey lists[72], the new Convention now establishes a uniform regime for all substances. Appendix 2 of the 1992 Convention now sets forth several criteria[73] which shall be used by the Contracting Parties but does not explicitly limit its scope of application to specific substances, an approach which is much more flexible. Black and grey lists provided in fact the advantage that it was clearly stated what specific substances were regarded as harmful to the marine environment and should therefore be eliminated as a matter of urgency. But the elimination was by this limited to the listed substances, thus not constituting an appropriate means to react efficiently to new scientific knowledge or to pay attention to different effects of substances which may be harmless in one way but pollute the marine environment in other ways.

Nevertheless Appendix 2 Art. 3 does explicitly mention some categories of substances[74] which are covered by the criteria of Appendix 2 Art. 1 and should thus be subject to programmes and measures. Compared to the very detailed former black and grey lists these very wide categories only clarify which substances do fulfil the criteria in any case, without limiting the scope of harmful substances to them.

1. Radioactive substances

This approach does of course have consequences as far as radioactive substances are concerned. The 1974 Paris Convention contained a separate regulation concerning radioactive substances which provided that the Contracting Parties shall take, *inter alia*, full account of the recommendations of the appropriate international organisations and agencies[75]. By including radioactive substances now in the uniform regime for all substances and taking into consideration the wording of Art. 1 para. 4 of

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[72] The intention being to eliminate pollution as far as the black list substances are concerned and to limit pollution by grey list substances.

[73] These criteria combine the criteria which previously governed the selection of substances as either black or grey list substances, Hey/IJlstra/Nollkaemper (note 5), 19.

[74] These categories mainly combine the black and grey lists of the 1974 Paris Convention, the main additions being biocides and nitrogen and phosphorus compounds, Hey/IJlstra/Nollkaemper (note 5), 19.

[75] Compare Art. 5 para. 2a) of the 1974 Paris Convention.

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Annex I of the 1992 Convention[76], it seems clear that the Commission now is considered to be itself an appropriate organisation for the regulation of radioactive substances. The practice of the Oslo and 1974 Paris Commissions in this respect being – according to the relevant Conventions – rather limited[77], the relationship of measures adopted by the Commission and within other forums may cause some difficulties in the future.

B. Dumping and incineration

1. Dumping

The 1992 Convention itself in Art. 4 does not prohibit dumping[78] but compels the Contracting Parties "... to take all possible steps to prevent and eliminate pollution by dumping ...", being thus in line with the Oslo Convention[79]. Nevertheless considerable improvement may be noted as far as the definition of dumping is concerned. In contrast to the Oslo Convention, the definition of dumping in Art. 1f) of the 1992 Convention now also covers the dumping of vessels, aircrafts and offshore-installations, which corresponds to Art. 1 para. 5 UNCLOS[80].

Art. 3 para. 1 of Annex II prohibits "... the dumping of all wastes or other matter ... except for those ... listed". As for the listed substances, different timetables for the phasing out are established for some of them, for others no specific date is mentioned. Obviously a general prohibition of dumping was politically not acceptable to the Contracting Parties[81]. Interestingly enough, the Declarations of the International North Sea Conferences clearly called for the phasing out of the substances listed in Annex II[82].

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76 Art. 1 para. 4 of Annex I reads as follows: "... the Contracting Parties shall also take account of:

a) the recommendations of the other appropriate international organisations and agencies;

b) the monitoring procedures recommended by these international organisations and agencies"(emphasis added).

77 Compare Hey/IJlstra/Nollkaemper (note 5), 20.

78 But dumping from offshore installations is prohibited in Art. 3 para. 1 of Annex III of the 1992 Convention.

79 Art. 1 of the Oslo Convention (note 1).

80 For further details see Hey/IJlstra/Nollkaemper (note 5), 24 et seq.

81 Juste (note 5), 383.

82 See paras. 14 et seq. of the Ministerial Declaration of the Third International Conference on the Protection of the North Sea, The Hague, 8 March 1990; para. 21b) of the 1987

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2. Dumping of radioactive substances

A very controversial issue among the Contracting Parties was the prohibition of the dumping of radioactive waste. Whereas the North Sea Ministers agreed already in 1990 that the North Sea was not suitable for the dumping of radioactive waste, the United Kingdom disagreed and reserved its position. The reason for that was the political will to retain the option of dumping such material in the sea, avoiding high costs of burying it on land. The point was further discussed at the preparatory meetings for the revision of the Oslo and the 1974 Paris Conventions[83]. In order not to endanger the elaboration of the new Convention as a whole the Contracting Parties finally agreed to a compromise which is now found in Art. 3 para. 3 of Annex II.

The dumping of low and intermediate level radioactive substances is thereby prohibited for all Contracting Parties except France and the United Kingdom, for whom this prohibition is applicable only for a period of 15 years (until 1 January 2008). They are only under the obligation to report in 1997 and then in two-year intervals to the meetings of the Commission on the steps taken by them to explore alternative land-based options. According to Art. 3 para. 3c) of Annex III, the Commission may decide by unanimous vote not to continue this exception or may even prolong the option for another ten years. As these decisions of the Commission have to be taken unanimously or pursuant to Art. 13 of the 1992 Convention, where a decision is only binding on those parties who accept it or do not opt out of the decision, no provision in the 1992 Convention can prevent these states, if they want to retain the option of dumping radioactive waste, from doing so. Thus the United Kingdom and France have obtained a position where they can decide as to the future of dumping of radioactive waste in the area of the North-East Atlantic.

3. Incineration

Art. 2 of Annex II simply states that "incineration is prohibited", which codifies the situation since 1990 when the Oslo Commission[84], following a decision of the International North Sea Conference[85], banned the incineration of wastes at sea in the North-East Atlantic.

London Declaration and para. F of the Bremen Declaration, all reprinted in: Freestone/IJlstra (note 2).

83 For further details see Juste (note 5), 386.

84 OSCOM Decision 90/2 of 23 June 1990 on the Termination of Incineration at Sea, reprinted in: Freestone/IJlstra (note 2), 126–127.

85 Para. 23 of the Hague Declaration (note 82).

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C. Offshore sources

Offshore activities as a source of pollution of the marine environment have up to now not been considered in the same respect in international instruments as other sources of pollution. Nevertheless the 1974 Paris Convention refers to it in Art. 3c iii) and some provisions are to be found in the Declarations of the International North Sea Conferences[86].

Art. 3 of Annex III prohibits "... any dumping of wastes or other matters from offshore installations ...", but as dumping of all wastes or other matter is already prohibited (with exceptions that are explicitly outlined) in Art. 3 para. 1 of Annex II[87], the additional significance of this provision seems rather unclear. All the more considering that the prohibition of Art. 3 Annex III explicitly relates only to dumping and excludes discharges or emissions. The aspects of discharge or emissions from offshore installations are only dealt with in Art. 4 and Art. 10 para. 1 of Annex III. According to Art. 4 "the use on, or the discharge or emission from, offshore sources of substances ..." are strictly subject to the authorisation of the competent authorities of the Contracting Parties, which shall implement the relevant decisions of the Commission. This obligation has to be regarded with respect to the fact that even if parties are hereby asked to really implement their commitments on the national level, they cannot according to Art. 13 of the 1992 Convention be forced to accept decisions of the Commission. The elimination of pollution by discharge or emission from offshore sources is not the subject of any specific rules[88] or timetables, the 1992 Convention expressing in this respect only a very general intention. Dumping is already dealt with in Annex II; nevertheless the emphasis in Annex III also relates to dumping activities, and these multifarious regulations certainly do not contribute to the transparency of the ocean dumping regime[89].

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[86] Annex III of the Hague Declaration; paras. 34–38 of the London Declaration (note 82).

[87] Which concerns the elimination and prevention of marine pollution by dumping in general.

[88] According to Art. 10 para. 1 Annex III, the Commission shall collect information about substances "which are used in offshore activities and ... agreed lists of substances ...".

[89] Ellen Hey, Marine Pollution, Vessel Source and Offshore Platform Pollution, Yearbook of International Environmental Law 3 (1992), 255–264, 263.

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D. Other sources

Art. 7 of the 1992 Convention calls upon the Contracting Parties to "... cooperate with a view to adopting annexes ... prescribing measures, procedures and standards to protect the maritime area against pollution from other sources, to the extent that such pollution is not already the subject of effective measures agreed by other international organisations or prescribed by other international conventions" (emphasis added). The Contracting Parties thus seem to have judged existing arrangements, as far as other sources of pollution are concerned, as adequate. Even if this might be true for the moment, the Contracting Parties limit their proper scope of action if they require evidence that other instruments do not effectively deal with a specific matter before considering them. Existing treaties and initiatives concerning e.g. vessel source pollution, show that such international instruments exist not only on a global level but also on a sub-regional level[90]. But then the pertinent question is why subregional initiatives in this respect should not be co-ordinated within the scope of the North-East Atlantic in the same manner as all other measures of regionalisation[91]. Although this provision extends the application of the 1992 Convention to other sources of pollution, it still limits it to pollution as defined in Art. 1d). Therefore, the only provision which refers to other human activities which may otherwise adversely affect the marine environment is the general obligation of Art. 21a) of the 1992 Convention. The reluctance of the Contracting States to further specify what human activities are referred to and how they should be limited is even less understandable, if one considers that other regional forums do explicitly address activities other than pollution[92].

[90] International Convention for the Prevention of Pollution from Ships, as amended 2 November 1973, 12 I.L.M. 1319 (1973) and its 1978 Protocol, 17 I.L.M. 546 (1978); paras. 24–27 of the 1990 Hague Declaration (note 82).

[91] According to Art. 23 of the 1992 Convention.

[92] The 1990 Hague Declaration of the International North Sea Conferences, for example, addresses nature conservation in para. 39 (note 82) and the Convention on the Protection of the Marine Environment for the Baltic Sea Area (note 25) addresses in its Art. 15 nature conservation and biodiversity.

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E. Assessment of the Quality of the Environment

According to Art. 6 of the 1992 Convention the "... Contracting Parties shall ...

a) undertake and publish ... joint assessments of the quality status of the marine environment and of its development, for the maritime area or for regions or subregions thereof;

b) include in such assessments both an evaluation of the effectiveness of the measures taken and planned ... and the identification of priorities for action".

Annex IV then specifies the corresponding means, stressing that permanent monitoring may be undertaken either for the purpose of ensuring compliance or for research purposes. For these purposes the Commission shall according to Art. 3 of Annex IV define and implement programmes, draw up codes of practice and approve the presentation and interpretation of their results. Regarding the diverse scientific and technical capacity of the Contracting Parties, this might be a field of application for the Commission in which the principle of regionalisation in setting up the programmes and codes of practice could be applied.

IV. Conclusion

The aim of the elaboration of a new Convention was to simplify the legal regime for the area of the North-East Atlantic as regards the protection of the marine environment[93]. The Contracting Parties succeeded in codifying recent political developments and technical advances to a large extent[94]. The 1992 Convention constitutes a shift from remedial to preventive action, a development which may recently be observed in international environmental law; the precautionary principle is now formally part of an international treaty in environmental law. The fact that the Contracting Parties commit themselves to an elaborated compliance procedure which allows the Commission not only to assess the compliance but also to take enforcement measures as well as the introduction of majority decisions, even if only applicable for the amendment of the very

[93] Part II of the Final Declaration of the Ministerial Meeting of the Oslo and Paris Commissions (note 20) emphasises "the comprehensive and simplified approach achieved by merging the Oslo and Paris Conventions into a single Convention under which all sources of pollution which may affect the maritime area covered by the 1992 Convention can be addressed".

[94] Critical: Hey/IJlstra/Nollkaemper (note 5), 47.

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technical provisions in the Annexes, shows that states agree – at least on a regional level – to limit their own interests in favour of the common interest to protect the marine environment as efficiently as possible. As long as the 1992 Convention has not entered into force, further developments will be undertaken on the basis of the Oslo and 1974 Paris Conventions. Regarding land-based pollution, the Commission of the 1974 Paris Convention adopted several decisions in 1992, remarkably each of them by a three-quarters majority[95], further illustrating the increasing preparedness of the Contracting Parties to circumvent unanimous decisions. An effective regime for the protection of the marine environment is thus being reached on a regional level, which may stimulate future developments in the universal context.

[95] Decisions may be accepted by a three-quarters majority according to Art. 18 para. 3 of the 1974 Paris Convention. This provision has only been used recently; compare André Nollkaemper, Marine Pollution/Land-based Pollution (Rivers/Air), in: Yearbook of International Environmental Law 2 (1992), 248–254, 251.

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